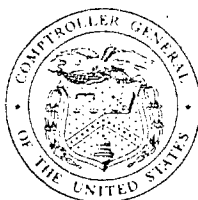


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

10,926

Proc 71

FILE B-193843; B-193843.2; B-193843.3 DATE: August 2, 1979
MATTER OF: Palmetto Enterprises, Inc., et al.

CNG 01801

DIGEST:

1. Agency properly rejected bids of apparent low bidder and second low bidder as non-responsive where manning charts accompanying bids indicated that bidders would not comply with minimum manning requirement of invitation for bids (IFB).
2. GAO will not address objections of awardee to agency's decision not to renew awardee's contract which agency believes was improperly awarded, because IFB should not have contained option provisions and any exercise of option would be improper. Under Defense Acquisition Regulation option provisions are not to be included in solicitation where services being purchased, such as food services, are readily available on the open market.
3. In absence of evidence clearly establishing a substantial adverse impact on competition, GAO will not object to agency's continued use of minimum manning requirements in effort to ensure adequate service.

This decision is in response to protests filed by Palmetto Enterprises, Inc. (Palmetto) and Industrial Maintenance Services, Inc. (IMS) against the award of a contract to Industrial Catering Company, Inc., Division of Merrill's Restaurant, Inc. (Industrial), under invitation for bids (IFB) No. DABT15-79-B-0001, issued by the Department of the Army (Army), as well as a protest filed by Industrial concerning the Army's decision not to renew its contract after the initial contract period ends on September 30, 1979.

[Protest Involving Agency's
Decision Not To Renew
Contract]

006045

add leave
A/C case Army
CNG 00573
DLW 02452

The IFB was issued by the Army on November 20, 1978, for food services at Fort Benjamin Harrison, Indiana. Bidders were required to submit bids for an initial nine month period running from January 1, 1979 to September 30, 1979, and for two one-year option periods. The IFB also provided that option prices would be evaluated in determining the low bid.

IMS submitted the apparent low bid of \$2,343,187.69, while Palmetto and Industrial submitted bids of \$2,673,610.94 and \$2,727,796.25, respectively. However, because both IMS's and Palmetto's manning charts indicated that less than the full number of employees required to be on duty in certain positions by the IFB would in fact be on duty, their bids were rejected as nonresponsive. Accordingly, the Army awarded the contract to Industrial as the low responsive and responsible bidder.

After learning of the award to Industrial, both Palmetto and IMS filed protests challenging the rejection of their respective bids. Palmetto asserted that it intended to comply with the minimum manning requirements of the IFB and that the unfilled slots for various positions in its manning charts were intended to represent break periods for the personnel filling those positions. IMS, likewise, indicated that it left certain slots in its manning charts empty to reflect break periods for the personnel filling those positions. IMS further indicated that it intentionally left other slots empty because the nature of the work required to be performed did not necessitate personnel being on duty for the period required by the IFB. Nevertheless, IMS maintained that it intended to utilize an amount of manhours in excess of the minimum required by the IFB and that the cost impact of its manning "shortages" was minor and should not have affected its standing as the low bidder.

Thereafter, the Army filed a report with our Office concerning the protests of IMS and Palmetto. In its report the Army argued that the bids of IMS and Palmetto were properly rejected as nonresponsive because the manning charts accompanying the bids revealed that the

bidders proposed not to comply with the minimum manning requirements of Part II, Section F of the IFB. However, the Army conceded that upon closer examination it had determined that the award to Industrial was improper because Industrial's bid also failed to comply with the minimum manning requirements of the IFB. Specifically, the Army noted that Industrial's bid indicated that it would not have either a project manager or an assistant project manager on duty on the weekends between 5:30 a.m. and 6:30 a.m. as required by the IFB. Consequently, the Army advised us that it would not renew Industrial's contract when the initial contract period ends on September 30, 1979, and would resolicit needs. The Army further advised us that upon resolicitation the IFB would "specify the exact number of personnel for the named positions and the exact hours to be worked" and "that lunch periods are considered non-work periods and that break time is considered time worked" in order to avoid any confusion on the part of the bidders in the future.

Subsequently, Industrial filed a protest with our Office objecting to the Army's decision not to renew its contract after the initial contract period ends on September 30, 1979.

Palmetto disagrees with the Army's opinion that its bid was nonresponsive. Palmetto in essence maintains that its bid did not take exception to the minimum manning requirements of the IFB and that the rejection of its bid was due to the contracting officer's arbitrary and unreasonable determination that the minimum manning requirements required that personnel actually be on duty during the hours specified and that employees on rest or lunch breaks would not be considered as being on duty. Palmetto further argues that the contracting officer seemingly ignored the language of Part I, Section D of the IFB which provided:

"In determining a bidder's responsibility, the bidder's manning charts must ensure that the total hours offered are not less than the required minimum staffing." (Emphasis added.)

Nevertheless, Palmetto concedes that the Army's decision to resolicit its needs is the most acceptable remedy in view of the confusion surrounding the minimum manning requirements. Additionally, Palmetto urges us to direct the Army to reexamine the usefulness of minimum manning requirements and manning charts in food service procurements in light of recent trends away from the use of manning charts by the Navy and the Air Force. In this regard, Palmetto maintains that the use of charts in effect destroys competition and actually penalizes responsible contractors who, through experience and good management skills, are able to provide satisfactory performance with a lighter workload than the required minimum.

On the other hand, IMS objects to the Army's decision to resolicit its needs after Industrial's contract ends on September 30, 1979. IMS contends that it was the low responsive and responsible bidder (for the reasons argued in its initial protest submissions) and that it is entitled to an award under the IFB. IMS maintains that the Army's proposed remedy is neither the remedy it sought "nor is it fair and equitable."

Industrial likewise objects to the Army's decision to resolicit its needs. In this regard, Industrial asserts that the "shortage" resulting from its failure to schedule a project manager or an assistant project manager between 5:30 a.m. and 6:30 a.m. on weekends amounts to only 2 manhours out of the required 2850.5 manhours per week and therefore was a minor irregularity which could have been waived under Defense Acquisition Regulation (DAR) § 2-405 or alternatively treated as a mistake under DAR § 2-406.4.

We agree that the bids of IMS and Palmetto were nonresponsive.

A bid is nonresponsive unless as submitted it constitutes an offer to perform, without exception, the exact thing called for in the IFB, and upon acceptance will bind the bidder to perform in accordance

with all the material terms and conditions of the IFB. In other words, if something on the face of the bid, or something specifically made a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with those terms, the bid is nonresponsive. See 49 Comp. Gen. 553, 556 (1970).

Under the terms of the IFB, a bidder was required to man various positions with a minimum number of employees during certain specified hours. For example, Part II, Section F 4 e provided in part:

"The contractor shall provide as a minimum workforce which shall apply to both a four serving line and a two serving line:

"(1) One competent project manager who shall be authorized to act for the contractor and be responsible for the accomplishment of all work assignments of all tasks and functions and coordination of all required services specified and/or ordered under the terms of this contract, and

"(2) One assistant project manager. The project manager and/or the assistant project manager shall be on duty during all operating hours (0530 to 1800) hours.

* * * * *

"(9) One first cook between the hours of 0400-1830 on weekdays and 0630-1700 hours on weekends and holidays.

* * * * *

"(14) A sanitarian (kitchen only) during the hours 0500-1800 on weekdays and 0800-1630 hours on weekends and holidays to clean kitchen and advise management on practices not conforming with medical standards."

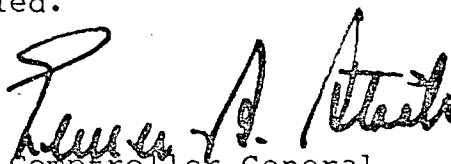
We believe it is clear that the IFB required that the specified minimum number of employees actually be working during the hours specified and that an employee taking a rest or lunch break would not be considered as being on duty. The purpose of minimum manning requirements or levels is to ensure that the contractor provides adequate service under the contract. By their very nature, minimum manning levels relate to employees who are actually on duty and not those who are unavailable for work. The manning charts accompanying both IMS's and Palmetto's bids indicated in varying degrees that less than the full number of employees required to be on duty would in fact be on duty. Although it is not clear precisely why the manning charts were required (the IFB suggests both that a failure to submit a manning chart with the bid would result in a nonresponsive bid and that the manning charts would be used in determining a bidder's responsibility), we have held that information submitted with a bid which is intended to reflect on bidder responsibility may nonetheless render a bid nonresponsive when it indicates that the bidder does not intend to comply with a material IFB requirement. Test Drilling Service Co., B-189682, September 15, 1977, 77-2 CPD 193. Thus, even if the manning charts were intended for use in determining bidder responsibility, since here those manning charts reflected deviations from the IFB requirements, we believe the contracting officer properly viewed the bids as nonresponsive.

We do not believe it is necessary to address Industrial's objections concerning the Army's decision not to renew its contract. Under DAR § 1-1502 (b)(i), option provisions are not to be included in solicitations if "the supplies or services being purchased are readily available on the open market." In this regard, it is well established that the food services industry is a highly competitive one in which a large number of firms compete for food services contracts with various Government activities. Consequently, we do not believe that Army properly included option provisions in the IFB and any exercise of those option provisions would be improper. See Safemasters Company, Inc., 58 Comp. Gen. 225 (1979), 79-1 CPD 38.

Finally, with respect to Palmetto's request that we direct the Army to reexamine the usefulness of detailed minimum manning requirements in view of their alleged anticompetitive impact on food services contracts, we note that we have previously found the use of minimum manning requirements in advertised procurements to be permissible, see Industrial Maintenance Services, Inc., et al., B-189303, B-189425, December 15, 1977, 77-2 CPD 466, and in the absence of evidence clearly establishing a substantial adverse impact on competition, we see no reason to question the continued use of minimum manning requirements which the agency believes is needed to ensure adequate service.

We do agree that the IFB should have been clearer, however, to ensure that all bidders understood exactly what their obligations would be under the minimum manning requirements and we are so advising the Secretary of the Army. We are also advising the Secretary that future solicitations for food services should not contain option provisions in accordance with DAR § 1-1502 (b)(i).

The protests are denied.


Comptroller General
of the United States